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On Wednesday morning, August 21st, in the city of Denver, Colorado, Hon. Edmund Wetmore, of New York, will open the twenty-fourth annual meeting of the American Bar Association. This is the first time this association has crossed the Mississippi, and in this respect is a noteworthy recognition of the western lawyer. There was a time when lawyers and laymen of the east deceived themselves with the idea, that in the vast empire lying between the Father of Waters and the Pacific Ocean, law and order were pilgrims and strangers in the land, and that in all disputes, whether civil or otherwise, the gun or the bowie knife was the arbitrament of last resort. In a few instances, the eastern imagination in some wild range of flight would insist that in such cities as St. Louis, Denver and Kansas City, indians with their squaws and papooses impeded traffic in the streets and laid in wait upon the highway. Gradually, in the natural course of events, this has all been changed. The vigorous young blood of the west, overcoming its environment, asserted its superiority, not only in the sterner arts of husbandry and manufacture, but also in the refinements of civilization. In jurisprudence her advance has been remarkable. Throwing off the obsolete and unreasonable exactions of the common law with such rash abandon as to amaze the eastern jurist, who could conceive of no larger horizon, she applied herself to the solution of new and difficult problems, with some of which the common law had never grappled, and many of which it was not competent to solve. With a mind absolutely free from prejudice, she took from both the civil and common law those principles which experience had proven to be suitable to her condition, but where neither source of jurisprudence had anything satisfactory to offer, with remarkable independence she cut a more direct and satisfactory path, and thus gradually developed those great code and statutory systems of the west, of which the States of Colorado and California are the most worthy examples. Is it to be wondered, therefore, that the lawyers of the west who were the leaders of her successful advancement and who assisted her in cutting the Gordian Knot of many a legal difficulty which her statesmen had failed to solve by code or statute, should have caught her independent spirit and finally forged their way into the very forefront of the profession—men like Stephen J. Field, David J. Brewer and John F. Dillon, the first editor of the CENTRAL LAW JOURNAL, who for clearness of perception and originality of thought have had no superiors, and whom the country has delighted to honor, and in whose sagacity and knowledge of the law it never hesitated to confide.

We repeat, therefore, that the holding of the American Bar Association in the city of Denver is a memorable recognition of western advancement in jurisprudence, and one which the members of the profession from that great section of our country should not fail to acknowledge by their large and enthusiastic attendance.

NOTES OF IMPORTANT DECISIONS.

SURETIES—CONTRACT OF INDEMNITY.—Suppose A replevies goods in the hands of B. A obtains two sureties to go on his bond, who, however, are led to sign the bond on the written promise of C, a third person having no interest in the suit, that he will indemnify them against all loss, on account of their contract of suretyship. B, the defendant, recovers judgment for $3,000. A and his two sureties, however, are insolvent. Can B be subrogated to the position of the sureties and enforce the contract of indemnity against C? That was the question for decision in the case of Henderson-Achert Lithographing Co. v. John Shillito Co. (Ohio), 60 N. E. Rep. 295, where it was held that since the sureties on an undertaking in replevin have no remedy at law or in equity upon a contract to indemnify them against loss on account of their suretyship, until such loss has occurred, the defendant himself in the replevin suit, after recovery of judgment, has no such remedy, even though the sureties and judgment debtor be absolutely insolvent and the judgment be not otherwise collectible. The defendant in this action was the indemnitor C and the plaintiff was B, the judgment debtor in the replevin suit. The obligation expressed in the defendant's obligation of indemnity to the sureties on the replevin bond, was "to guaranty the sureties against any loss by being a party to the bond." The court said:

"The defendant is a stranger to the debt, and its agreement is one strictly of indemnity to the

sureties; so that its individual liability on the agreement to enforce which this action was brought is in no sense a property right of the plaintiff's debtor, and satisfaction of the judgment obtained therefrom would not be payment out of the debtor's estate, but out of the estate of a stranger. Confessedly, therefore, the liability of the defendant on its covenant to indemnify the sureties against loss can be reached by the creditor, if at all, only through some right or remedy that belongs to the sureties. And it should be borne in mind that the defendant's obligation does not arise out of any principle of equity, but is created by special agreement of the parties. Except for his express agreement, the defendant would have nothing to do with the liability of the sureties. That agreement, therefore, which alone created must determine the extent of the defendant's liability, both at law and equity; for there is no principle upon which a court of equity or law can enlarge the legal effect of the agreement. It seems self-evident that the rights of the creditor, through subrogation to the remedies of the sureties, can, in no case, exceed those of the latter, and that, until the indemnitor's covenant has been broken, or there has been some failure to perform it, no action can be maintained thereon by either. This was declared in Trust Co. v. Reeder, 18 Ohio, 35, 47, and there is no diversity of authority on that subject. There is an essential difference, in legal effect, between covenants of indemnity, strictly,—that is, of indemnity against loss,—and covenants to pay or assume or stand for the debt, or a surety's liability thereon. A right of action accrues on those of the latter class as soon as the debt matures and is unpaid, because the liability then becomes absolute, and the failure to pay is a breach of the express terms of the covenant; while those of the former class are not broken, and no right of action accrues until the indemnitee has suffered a loss against which the covenant runs. This distinction grows out of the express terms of the contract, and is well established by authority. It is expressed by Mr. Justice Swayne in Wicker v. Hoppock, 6 Wall. 94–99, 18 L. Ed. 752, 753, as follows: 'In that class of cases (contracts of indemnity) the obligee cannot recover until he is actually damnified, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well-settled distinction between an agreement to indemnify and an agreement to pay. In the latter case a recovery may be had as soon as there is a breach of the contract, and the measure of damages is the full amount agreed to be paid.' That the distinction obtains at law counsel concedes. But it is insisted that a different rule prevails in equity, which, it is claimed, will entertain a suit for the specific performance of indemnifying covenants before a loss has been sustained, by compelling the payment or discharge of the surety's obligation, for his better and more complete exoneration. There is[] both] reason and authority to sustain the proposition that a covenant, though by a stranger, founded upon a sufficient consideration, to pay or to assume or to stand for a debt on which a surety is bound, may be specifically enforced in chancery, after the maturity of the debt, if it be not then paid by the covenantor. The reason is, as has already been stated, that by his failure to pay he has failed to perform his covenant, and the remedy is within its express terms. The courts have many times so held. But on no sound principle can a court of chancery, any more than a court of law, compel an indemnitor to perform his covenant in advance of the happening of the contingency or event upon which, by its terms, it is to be performed. Such a remedy would necessarily involve, not the enforcement of the contract made by the party, but its modification by the court, and its enforcement in that modified form."

JURISDICTION OVER THE MAIN BODY OF THE OHIO RIVER.

Although one hundred years have elapsed since the compact between Kentucky and Virginia was approved, the latter portion of one section, has never been construed by the Supreme Court of the United States, and as that tribunal may at no distant day be called upon to construe it, I presume that it will not be inappropriate for me to offer some suggestions as to the construction of the section in question. As there has been a great deal of contention over the construction of the later portion of section 11 of the compact, I made an investigation of the matter merely for historical information, and after a careful examination, I have written a few suggestions, as to how the later portion of the section should be construed. Section 11 of the compact between Kentucky and Virginia says: "Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdiction of this commonwealth and of the proposed state, on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river." The question to be discussed is: By the clause "and the respective jurisdictions of this commonwealth, and of the proposed state on the river as aforesaid, shall be concurrent only

with the states which may possess the opposite shores of the said river" did Virginia mean to give concurrent jurisdiction with herself and Kentucky, over the main body of the Ohio river, both civil and criminal, to the states, which are now Ohio, Indiana and Illinois? As this exact question is now pending before the Court of Appeals of Kentucky, and being a public question, in which the people of the six states of West Virginia, Virginia and Kentucky; and Ohio, Indiana and Illinois are interested, for the readers of this journal, I have prepared the following suggestions for the construction of this clause: "And the respective jurisdictions of this commonwealth, and of the proposed state, on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river."

1. All statutes relating to the same subject must be construed in *pari materia*. So, therefore, all resolutions of the Virginia legislature, relating to the cession of the northwestern territory, the deed of cession of the northwestern territory, the ordinance of 1787, by congress accepting the grant of the same, the act of 1788, by the legislature of Virginia amending the deed of cession, at the request of congress, and the acts of congress admitting Kentucky, Indiana, Illinois and Ohio into the Union as states, the compact between Kentucky and Virginia must be all construed as a whole. The statutes can be found as follows: (History of the northwestern grant, 10 Henning's Statutes, page 547; Acts of General Assembly of Virginia, authorizing the deed of cession of the northwestern territory to the United States, 11 Henning's Statutes, page 326. Deed of cession, *Ibid.*, page 571; act admitting Kentucky into the Union, 1 U. S. Stat. at Large, page 189; act admitting Ohio into the Union, 2 Statutes at Large, page 173; act admitting Indiana, 2 Statutes at Large, page 103; act admitting Illinois into the Union, 3 Statutes at Large, page 428).[1] In none of these statutes, except the compact between Virginia and Kentucky, is there any language that could possibly be construed that Virginia wished to confer on the states north of the Ohio river, concurrent jurisdiction over that river. Virginia retained all jurisdiction of the river in herself in the deed of cession. And the deed of cession plainly shows that Virginia wished to retain the jurisdiction of the Ohio river in herself.

2. All right of soil or jurisdiction Virginia had in the river was transferred to Kentucky opposite the shore of the latter state.[2]

3. The doctrine of contemporaneous construction is applicable. The construction placed upon section 11 by the statutes passed nearly at the same time, as the clause in question can be restored to for the purpose of construing it. This rule especially applies where the clause, as the one in question is, is ambiguous. The compact between Kentucky and Virginia was approved December 18, 1789, by both states. Congress enacted laws admitting Kentucky into the Union as a state in 1791, 1792, according to the provisions of this compact. In April, 1802, the state of Ohio was admitted into the Union, and its boundary was fixed at the Ohio river, but nothing was said in the act of congress admitting Ohio into the Union, about Ohio having concurrent jurisdiction over the Ohio river. On April 19, 1816, congress passed an act authorizing the inhabitants of the territory of Indiana to form a State. It fixed the boundary of Indiana on the west, at the middle of the Wabash river, and on the south by the Ohio river. Notice the distinction. The boundary is fixed in the middle of one river, and on the north of the other river. But further in this act it is said: "That the said state shall have concurrent jurisdiction on the river Wabash, with the state to be formed west thereof, so far as the said river shall form a common boundary to both." But the act does not give Indiana concurrent jurisdiction with the state of Kentucky over the Ohio river. This omission shows that the federal government never assumed that the "proposed states" (Ohio, Indiana and Illinois), had concurrent jurisdiction with the state of Kentucky over the Ohio river. Two years later (1818) Illinois was admitted into the Union and its boundary was fixed at the Indiana line of the Wabash river (the middle of the river), and the middle of the Mississippi river, and on the Ohio river. Illinois is given concurrent jurisdiction over the Wa-

[1] Handley v. Anthony, 6 Wheat. 385; Shanks v. Dupoint, 3 Pet. 255; Keyser v. Coe, Fed. Cas. No. 7,750.

[2] Act of Congress admitting Kentucky into the Union, 1 U. S. Stat. at Large, p. 189; Missouri v. Kentucky, 11 Wall. 401.

bash river, with the state opposite it, but the act omits to give the state concurrent jurisdiction over the Ohio river. This omission is significant. It shows that congress did not regard the compact of Virginia and Kentucky, as surrendering the right of exclusive jurisdiction in the Ohio river with any states or proposed state. In 1820, Virginia declared the Ohio river lying opposite her was to be considered as compounded, and is declared to be compounded within the bodies of several of her counties subject to the provisions contained in the article of compact between Kentucky and herself.[3] This would seem to exclude the idea that the states on the opposite shore of the Ohio river had concurrent jurisdiction over the main body of the river. Kentucky had ten years prior to that time, enacted a statute to the same effect.[4] Even if the federal government which owned the northwestern territory, at the time of the compact between Kentucky and Virginia, had acquired concurrent jurisdiction with those states over the main body of the Ohio river, it waived it by the acts admitting Ohio, Indiana and Illinois as states into the Union, and not giving them concurrent jurisdiction over the Ohio river.

4. Even if the federal government had acquired concurrent jurisdiction over the Ohio river, it did not surrender it to Indiana as the act which admitted Indiana into the Union as a state did not give it. Could Indiana acquire any right not given her by the federal government? She derived her whole existence from the federal government, and she can claim no right from any source, except that government.

5. Ohio has never enacted any legislation claiming concurrent jurisdiction over the main body of the Ohio river, that I can find after an earnest and painstaking investigation. Nor has its supreme court ever expressly claimed jurisdiction over the Ohio river, although there is some *obiter dictum* in one case claiming that the state of Ohio owned the Ohio to the middle of the river. I understand that the executive officers of Ohio have never claimed jurisdiction over any part of the Ohio river above low-water mark on the Ohio shore.

6. Illinois never claimed any jurisdiction over the Ohio river until the constitution of 1848, sixty years after the compact between Kentucky and Virginia, if she has ever claimed it at all. The constitution of Illinois of 1818, fixed the boundaries of that state according to the act admitting Illinois into the Union, but in the constitution of 1848 it is provided: "This state shall exercise such jurisdiction upon the Ohio as she is now entitled to, or such as may be agreed upon by this state and the state of Kentucky." It is conceded by this provision of the Illinois constitution, that Kentucky has jurisdiction over the Ohio river except the jurisdiction that Illinois had already acquired, namely, jurisdiction above the low-water mark on the northern shore. Prior to 1848 Illinois had never claimed concurrent jurisdiction over the Ohio river with Kentucky, and she only claimed in the constitution of 1848 to the low-water mark on the northern shore, and conceded to Kentucky the jurisdiction beyond the low-water mark on the northern shore. The same provision as to the jurisdiction of Illinois over the Ohio river that was in the constitution of that state of 1848, is in the constitution of 1870. Illinois, therefore, has never claimed concurrent jurisdiction with Kentucky over the main body of the Ohio.

7. In the constitution of Indiana of 1816, the preamble states that the constitution is formed consistent to the law of congress entitled: "An act to enable the people of Indiana territory to form a state." That act fixed the limits of the state as stated in number 3 of this article on the Ohio river, and it did not give Indiana concurrent jurisdiction over the Ohio river, and so consequently Indiana never claimed concurrent jurisdiction over the Ohio river in the first constitution of that state. There was also an ordinance passed by the first constitutional convention of Indiana, accepting the boundaries of the state as fixed by congress, in the act to enable the people of Indiana territory to form a state. Also in the first constitution of Indiana (article 5, section 2) the jurisdiction of the Supreme Court of Indiana is fixed "with the limits of the state;" these limits did not include concurrent jurisdiction over the main body of the Ohio river, neither by the act of congress admitting Indiana, nor by the ordinance of the constitu-

[3] Code of Virginia, p. 50.
[4] Morehead & Brown, vol. 1, page 268.

tional convention of Indiana, accepting the act of congress defining the boundaries of the state. In the constitution of 1851, Indiana, after the lapse of over sixty years from the date of the compact between Kentucky and Virginia asserted by legislative action the claim that she had concurrent jurisdiction with Kentucky over the Ohio river for the first time.

If the compact between Kentucky and Virginia gave Indiana jurisdiction, which was concurrent in those states, did not Indiana abandon that concurrent jurisdiction by waiting for sixty years, after the compact, and thirty-five years after she became a state before she enacted legislation asserting her claim? The first case on this question, andwhere the supreme court first claimed jurisdiction is one of Carlisle v. State.[5] That case has been followed in a number of subsequent cases by that court. They are all cited in Packet Company v. Mickey.[6]

8. The fact that Indiana has assumed jurisdiction over the Ohio river for forty years, does not confer it, if the jurisdiction has been wrongfully assumed.[7]

9. The clause of the compact between Kentucky and Virginia in question was for the purpose of giving free navigation to the citizens of the United States.[8]

10. The only grant meant in this clause was concurrent jurisdiction over the northern shores.[9]

11. Indiana, not being a party to the compact between Kentucky and Virginia can take no advantage under the compact.[10]

12. The construction of the clause in question has been argued before the Supreme Court of the United States, several times, but in every instance that court has declined to pass upon the question as to whether or not concurrent jurisdiction, was conferred over the main body of the Ohio river, by the clause in question. In Handley v. Anthony,[11] the question was presented but not passed upon, although Chief Justice Marshall, intimated that the clause was simply a repetition of the deed of cession of the Northwestern territory. In Penn v. Bridge Co.,[12] the supreme court decided that under section 11 of the compact between Kentucky and Virginia the navigation of the Ohio, was for the citizens of the United States. In Sherlock v. Alling,[13] the exact question as to whether Indiana has concurrent jurisdiction with Kentucky over the main body of the Ohio was presented. The Supreme Court of Indiana had rested its decision upon that ground alone. The supreme court declined to pass upon the question as it decided that the collision between the two steamboats, out of which the action grew, took place above the low water mark of the Indiana shore. But there is an intimation that had the collision taken place below the low water mark, that the laws of Kentucky, governing the right of an administrator to sue, would have controlled. Again, in Indiana v. Kentucky,[14] the question was argued by the late senator Joseph E. McDonald, but the court did not pass upon it.

13. The title to the land under the Ohio river belongs to Kentucky, Virginia and West Virginia, and they claim and exercise the power to grant title thereto to their citizens as patentees.[15] This goes to low water mark on the north bank under the original deed of cession from Virginia to the federal government. The laws of state have no extra territorial force. The power of a state law ends at the territorial line. If one state claims jurisdiction over the land of another state she must show some grant to her, from the state within which the land is situated. Failing in this, the claim fails. Kentucky has never granted to Indiana any jurisdiction over the Ohio river, concurrent or otherwise. When congress defined the boundary of Indiana, in her enabling act, it was done in accordance with the act of cession. Congress was the sovereign power on this subject. In defining the north bank of the

[5] 33 Ind. 55 (1869).
[6] 142 Ind. 310.
[7] Coffee v. Grover, 1-23 U. S. 29, and the authorities therein cited. Keyser v. Coe, Fed. Cas. No. 7,750.
[8] Penn v. Bridge Co., 13 How. 565; Garner's Case, 3 Gratt. 710, 711, 735.
[9] Garner's Case, 3 Gratt. 675, 731, 734, 742, 752.
[10] Garner's Case, 3 Gratt. 735.
[11] 5 Wheat. 385.
[12] 13 How. 518.
[13] 93 U. S. 101.
[14] 136 U. S. 479.
[15] Indiana v. Kentucky, 136 U. S. 479; Henderson Bridge Case, 173 U. S. 592, and the authorities therein cited. State v. Plants, 25 W. Va. 119, 52 Am. Rep. 119.

Ohio river as the southern boundary of the proposed states of Ohio, Indiana and Illinois, in accordance with the deed of cession to the United States, and Ohio and Illinois, have never claimed jurisdiction beyond this boundary for any purpose, nor did Indiana for thirty-five years after she became a state. The compact between Virginia and Kentucky, creates no claim for Indiana as shown by Garner's case, above cited. "There must be accurate and express treaty stipulation between the contracting parties to confer extra territorial jurisdiction."[16]

Conclusion.—In my humble judgment the states of Ohio, Indiana and Illinois, have no concurrent jurisdiction, over the main body of the Ohio river, with the states of West Virginia, Virginia and Kentucky for the foregoing reasons.

Louisville, Ky. HARDIN H. HERR.

[16] Vattel, Law of Nations, 120 (6th Amer. Ed.) "Sovereignty united with domain establishes jurisdiction." Vattel, p. 165.

Since the above article was written the Kentucky Court of Appeals has decided the question discussed in it. The court holds that Indiana has not concurrent jurisdiction with Kentucky over the Ohio river. Meyler v. Wedding, 53 S. W. Rep. 808, 60 S. W. Rep. 20. The opinion was delivered by Judge White; Judge Du Relle delivered a separate and concurring opinion; Judge Hobson (Judge Burnam concurring with him), delivered a dissenting opinion. Judge Hobson argues strenuously, that by section 11 of the compact between Kentucky and Virginia, that it was meant to confer concurrent jurisdiction over the main body with the proposed states (Illinois, Indiana and Ohio). The learned judge, in his dissenting opinion, presents the view opposite to my conclusion. If any one desires to further examine the question, and read the other side of the controversy, it will be well to read the dissenting opinion. H. H. H.

HUSBAND AND WIFE — AGREEMENT FOR SEPARATION—VALIDITY.

FOOTE V. NICKERSON.

Supreme Court of New Hampshire, Merrimack, March 15, 1901.

1. A contract between husband and wife, in which they agree to live separately, is void.

2. A contract between a husband and wife, which provides that they shall live separately, and which releases their claims on the property of each other both before and after death, is an entire contract, and being void as to the separation, does not bar the interest of the husband in the estate of the wife.

3. Pub. St. ch. 195, § 18, providing that the willful desertion of a wife by a husband, and a continued absence and failure to support the wife for the term of three years preceding her death, shall defeat all claims of the husband in her estate, does not apply to a separation and continued absence and failure to support in pursuance of an agreement between the parties.

4. Pub. St. ch. 176, § 8, authorizing a married woman living separate from a non resident husband to manage, sell and convey her property as if unmarried, does not defeat the interest of the husband in the estate of the wife on the death of the latter, so as to render the will of the wife disinheriting the husband valid.

The defendant, Stephen D. Nickerson, and the plaintiff's testatrix, Martha J. Nickerson, were married in Maine in 1891, and lived together there until April, 1892, when the testatrix informed her husband that she intended to leave him. Thereupon they agreed to separate, and he executed a writing as follows: "This is to certify that I, Stephen D. Nickerson, husband of Martha J. Nickerson, do mutually agree to separate on friendly terms, and to make no demand (neither me nor my heirs) on her, nor her property, after this date." At the same time she executed a similar writing, left him, and came to Bow, in this county, where she resided until her decease in 1897. Each party had some property. There was no legal cause for divorce or separation. He continued to reside in Maine, and in no way aided in her support. By the will the testatrix provided as follows: "I will give and bequeath unto my husband, Stephen D. Nickerson, of Orrington, Maine, the sum of one dollar. I make this small bequest because of his agreement to live separate from me, and to make no claim upon my estate in any way." The defendant seasonably waived this provision, and upon his petition the executor was ordered to file an inventory and give bonds. From this decree the executor appealed, for the reasons that the defendant had no such interest in the estate as to entitle him to maintain his petition, and that he was estopped by the writing above set out to claim his distributive share in her estate.

PEASLEE, J.: One question presented for decision is, whether the relation of husband and wife is one that the parties can dissolve or modify; whether the married *status* is so far within the control of the parties that its alteration is a result they can themselves effect, provided they agree upon the terms. It may fairly be said that the question is not settled by the decisions in this state. It has been touched upon incidentally, but in no case has it been directly involved. It therefore becomes necessary to examine the law on the subject elsewhere. Turning to other jurisdictions it will be found that the question has been the subject of much litigation, and with varied results. Not only do the cases in one state conflict with those in other states, but in the same jurisdiction the views of one generation have often been held to be erroneous in later times. There is disagreement not only as to what the law is and what the policy on this subject should be, but also as to the history of the law, and how it was held to be in former times. In order, then, to reach a satisfactory solution of

the question, it is essential to examine with some minuteness the historical aspect of the law applicable in this case.

The English cases decided before the Revolutionary War are conflicting, and many of them apparently imperfectly reported. The precise question here involved did not then come directly before the so-called "law courts." All causes concerning marriage and the marital *status* were tried in the ecclesiastical courts, which also had jurisdiction of the probate of wills and the administration of estates. 2 Bl. Comm. 496. While, in a narrow sense, these were not common-law courts, they administered the unwritten law of the realm upon these subjects. Although the inferior judges were appointed by the ecclesiastics, the bishops themselves were nominated by the king. 1 Bl. Comm. 280. In all causes an appeal might be taken to the king, who was represented by the court of delegates, appointed by him for that purpose. "This commission is frequently filled with lords, spiritual and temporal, and always with judges of the courts at Westminster and doctors of the civil law." 3 Bl. Comm. 66. The law thus administered is a part of the common law of England. Reg. v. Millis, 10 Clark & F. 534, 671. To ascertain the state of the English common law as to divorce, suits for nullity, and other matters directly concerning the marital relation, recourse must be had to the decisions of those courts. The doctrine of either total or partial divorce, by agreement of the parties, found no favor there. They were not permitted "to release themselves by any private act of their own, or for causes which the law itself has not pronounced to be sufficient and sufficiently proved." Mortimer v. Mortimer, 2 Hagg. Consist. 310, 318; 2 Rop. Husb. & Wife, 267. The rule that separation agreements are wholly void, seems to have been adhered to from the earliest times until the court was abolished, in 1857, by the statute of 20 & 21 Vict. ch. 85. Smith v. Smith, 2 Hagg. Ecc. Supp. 44, note; Westmeath v. Westmeath, *Id.* 1; *Id.*, 4 Eng. Ecc. R. 258; Barlee v. Barlee 1 Addams, Ecc. 301, 305; Nash v. Nash, 1 Hagg. Consist. 140.

The English common law relating to this subject (which became the common law of this state, so far as applicable to conditions here) was that as to the settlement of estates, suits of nullity of marriage, and such limited divorce as was then granted, a separation agreement was wholly void. It was refused recognition in chancery, and even in the law courts its efficacy was denied by the later cases. The only case actually deciding that such an agreement was a valid modification of the marriage contract was Rex v. Mead, 1 Burrows, 542, and this was not followed in the cases in 2 W. Bl. Contemporary judges and text writers understood this to be the state of the law. It was so laid down by Lord Mansfield, who had been chief justice of the king's bench since 1756, and who, shortly after the decision of these cases, thought that the law should be held otherwise, because of changed conditions. Ringsted v. Butler, 3 Doug. 197, 203; Barwell v. Brooks, *Id.* 371, 373: Corbett v. Poelnitz, 1 Term R. 5. The modern English doctrine differs widely from this, and an examination of its origin and development shows that it is a departure from the old law, and not merely an adaptation of recognized principles to changed conditions. It was immediately after the rendition of the decisions reported by Blackstone that changes in the law began to be made. In 1783, Lord Mansfield, while admitting that the common law was otherwise, held that an agreement for separation bound both parties as though they were sole. The point at issue was whether the wife could be sued alone. The fact that these agreements had come into use, and by them separate estates had been given to wives, who, for that reason, ought to be liable to suit, was considered to be of controlling importance. The question of the effect of the decision upon the marital *status* was not discussed. Ringsted v. Butler, 3 Doug. 197. The object of the decision plainly was to accomplish what has been done here by legislation. It gave married women a limited power to contract and sue and be sued. A similar result was reached the following year. Lord Mansfield said: "The fashion of the times has introduced an alteration, and now husband and wife may, for many purposes, be separated and possess separate property, —a practice unknown to the old law." Barwell v. Brooks, 3 Doug. 371, 373. In 1794 the new doctrine was affirmed in the leading case of Corbett v. Poelnitz, 1 Term R. 5. Lord Mansfield again justified the result by reasoning similar to that just quoted. These cases "introduced a new principle into the English law, respecting the relations of husband and wife; but a principle that was familiar to the Roman law, and to the municipal law of most of the nations of Europe." 2 Kent, Comm. 159. It was natural that this principle should appeal to Lord Mansfield, whose work is so distinguished for its up-building of commercial law. So long as he remained upon the bench these cases were followed. Accordingly, in 1788, Mr. Justice Buller said that separation deeds were valid when fairly entered into, and that courts of equity had jurisdiction to enforce them. Fletcher v. Fletcher, 2 Cox, Ch. 99. In another case he said that it had been decided that by agreement the parties could make the wife a *feme sole* as to everything but the right of remarriage. Compton v. Collinson, 2 Brown, Ch. 377. The case went off upon another point, and the cases upon this question are not cited. Acquiescence in the doctrine of Corbett v. Poelnitz was by no means uniform. The case "gave rise to great scrutiny and criticism. It was considered as a deep and dangerous innovation upon the ancient law." 2 Kent, Comm. 159. Lord Mansfield retired in 1788. His successor, Lord Kenyon, had passed most of his life as a law writer for more successful practitioners, and as a judge of an inferior court in a remote part of the

kingdom. His reverence for the law was as great as Mansfield's devotion to progressive ideas. The effect of the change is plainly traceable in the decisions upon this subject. In 1790 the case of Compton v. Collinson, *supra*, having been sent out from chancery for the opinion of the court of common pleas upon the law, Lord Loughborough said that the question of a separated wife's liability to suit was still an open one. Compton v. Collinson, 1 H. Bl. 334. In the same year the ecclesiastical court again declared its adherence to the doctrine heretofore noticed. Nash v. Nash, 1 Hagg. Consist. 140. In 1792 the chancery court, following the *dictum* of Justice Buller in Fletcher v. Fletcher, decreed specific performance of articles of separation, in the face of the husband's offer to return and live with his wife. Guth v. Guth, 3 Brown, Ch. 614. This case was never considered sound. Soon after its decision Lord Loughborough denied equity jurisdiction of suits involving the marital relation. Legard v. Johnson, 3 Ves. 352, decided in 1797. Again in 1792, Justice Buller expressed his adherence to the law as held by Lord Mansfield. A writ of *habeas corpus* was directed, at the instance of J. Greygoose, to bring up the body of his wife. It was alleged that she was detained by the defendant, and living with him in adultery. One defense set up, but not fully pleaded, was a separation contract, and Rex v. Mead, 1 Burrows, 542, was relied upon. Justice Buller said: "If this case turn out on further examination to be like that in Burrows, I am strongly inclined to think that would be an answer to the writ. But that is not at present made out." Rex. v. Winton, 5 Term R. 89. The chief justice was absent when this decision was rendered. The question was first considered by Lord Kenyon in 1794, when he declared that, if changes in the law were needed, they must be made by the legislature. The authority of Corbett v. Poelnitz was doubted, but the non-liability of the defendant was finally put upon other grounds. Ellah v. Leigh, 5 Term. R. 679. This was after Justice Buller had retired from the king's bench, to accept a seat upon the common bench. Two years later, when speaking of the same subject, Lord Kenyon said: "We must not, by any whimsical conceits, supposed to be adapted to the altering fashions of the times, overturn the established law of the land. It descended to us as a sacred charge, and it is our duty to preserve it." Clayton v. Adams, 6 Term R. 604. A decision of his in 1793 has sometimes been referred to as inconsistent with the views expressed in the cases just cited. In a suit for the seduction of a wife, the defense was set up that before the commission of the acts complained of the husband and wife had voluntarily separated. It was decided that this went to the merits of the action. Weedon v. Timbrell, 5 Term R. 357. The real ground of the decision was that this action is not maintainable by one who has abandoned the right upon which the action is founded. It does not decide that rights had been acquired under a valid contract. In harmony with this view, the same judge held that the fact that the husband was living in adultery was a bar to his suit. Wyndham v. Wycombe, 4 Esp. 16. While this decision was erroneous (Cross v. Grant, 62 N. H. 675, and cases cited), it is of importance as showing that Weedon v. Timbrell was not based upon the proposition that a separation agreement is a valid contract. In 1800 the question involved in Corbett v. Poelnitz came before Lord Eldon. He refrained from deciding it, because it was then pending in a case which was soon to be argued before all 12 judges; but he reviewed the cases, and manifestly was of the opinion that the decision of Lord Mansfield was unsound, and that Rex v. Mead, 1 Burrows, 542, was not an authority for the validity of separation agreements. Beard v. Webb, 2 Bos. & P. 93. In the case there referred to the question was fairly presented for decision. It was twice argued before all the judges, except Justice Buller, who was incapacitated by the illness of which he died shortly thereafter. All concurred in the opinion of the chief justice, overruling Corbett v. Poelnitz. Lord Kenyon said: "If * * * the parties were competent to contract at all, it would then become material to consider how far a compact can be valid, which has for its object the contravention of the general policy of the law in settling the relations of domestic life, and which the public is interested to preserve; and which, without dissolving the bond of marriage, would place the parties in some respects in the condition of being single, and leave them in others subject to the consequences of being married, and which would introduce all the confusion and inconvenience which must necessarily result from so anomalous and mixed a character. In the course of the argument some of these difficulties were pointed out, and it was asked whether, after such an agreement as this, the temporal courts could prohibit it if either were to sue in the ecclesiastical court for the restitution of conjugal rights; whether the wife, if she committed a felony in the presence of her husband, would be liable to conviction; whether they could be witnesses for or against each other; whether they could sue and take each other in execution? And many other questions will occur to every one, to which it will be impossible to give a satisfactory answer. For instance, it may be asked how it can be in the power of any persons by their private agreement to alter the character and condition which by law results from the state of marriage while it subsists, and from thence to infer rights of action and legal responsibilities, as consequences following from such alteration of character and condition; or how any power, short of that of the legislature can change that which, by the common law of the land, is established as the course of judicial proceedings." Marshall v. Rutton, 8 Term. R. 545. Chief Justice Eyre of the common pleas, who retired shortly after the first argument of the case, also concurred in this opinion.

It was thus that the law stood until the death of Lord Kenyon, in 1802. During that year a case arose, involving the validity of an agreement between George Chambers, his wife, and certain trustees. The husband agreed that in case of a future separation the wife might live where she chose, without molestation from him, and that he would make certain payments to the trustees for her. A separation took place. The payments were not made, and the trustees sued on the covenant. The case was argued upon the general invalidity of separation agreements, and especially upon the point that an agreement looking to a future separation is illegal. Lord Ellenborough, C. J., held the contract to be valid, upon the ground that "the question which has been agitated appears to have been laid at rest for a long period by repeated decisions and the uniform practice of the courts." So far as the agreement related to a future separation, he declared it was no worse than others which had been upheld. Rodney v. Chambers, 2 East, 283. The case of Nicholls v. Danvers, 2 Vern. 671, was relied upon as authority for the proposition. It is true that, taking that case as reported by Vernon, such a holding might, perhaps, be inferred. There was such an agreement between the parties, but the court did not enforce it. Proceedings for cruelty had been had in the ecclesiastical court (1 Fonbl. Eq. 97, note), and this was merely an application for alimony, in accordance with the practice in the chancery courts after the Restoration. Thus, in two years' time, at the first term presided over by Lord Ellenborough, the conservative doctrines laid down by Lord Kenyon were disapproved of, and a decision was rendered of so radical a nature that it finds no support in the cases preceding it, and has not since been followed as an authority. A side light upon this case is seen in the reference to the wife as "the Honorable Jane Rodney," and to the husband as "George Chambers." In the following year Lord Eldon expressed a strong disapproval of Rodney v. Chambers, and of the whole doctrine of separation agreements. He suggested, however, that the practice of upholding them to a limited extent (that is, as to property rights might have become too firmly established to be overturned. The case went off upon a question of pleading, and was then settled by the parties. St. John v. St. John, 11 Ves. 526. In 1804 the master of the rolls recognized the validity of an agreement to pay an annuity to a separated wife, without discussion of the question. Cooke v. Wiggins, 10 Ves. 191. In 1806 the common pleas, by a divided court, held that an unfulfilled agreement to pay a separate allowance did not free the husband from liability for necessaries thereafter furnished to his separated wife. Nurse v. Craig, 2 Bos. & P. (N. R.) 148. Sir James Mansfield, C. J., dissented, following the reasoning of Lord Mansfield in the earlier cases. In Worrall v. Jacob, 3 Mer. 256, 268 (decided in 1817), Sir William Grant, master of the rolls, said: "I apprehend it to be now settled that this court will not carry into execution articles of separation between husband and wife. It recognizes in them no power to vary the rights and duties growing out of the marriage contract, or to affect, at their pleasure, a partial dissolution of that contract. It should seem to follow that the court would not acknowledge the validity of any stipulation that is merely accessory to an agreement for separation. The object of the covenant between the husband and the trustee is to give efficacy to the agreement between the husband and the wife; and it does seem rather strange that the auxiliary agreement should be enforced, while the principal agreement is held to be contrary to the spirit and the policy of the law." He also quotes from Lord Eldon, as follows: "If this were *res integra*, untouched by *dictum* or decision, I would not have permitted such a covenant to be the foundation of an action or a suit in this court. But if *dicta* have followed *dicta* or decision has followed decision, to the extent of settling the law, I cannot, upon any doubt of mine as to what ought originally to have been the decision, shake what is the settled law upon the subject." St. John v. St. John, 11 Ves. 526. Accordingly, effect was given to an appointment by a separated wife of property, deeded by the husband to trustees in consideration of their agreement to save him harmless from his wife's debts, etc. Shortly thereafter the ecclesiastical court again reiterated its adherence to the view that these agreements are void. "These courts, therefore, to which the law has appropriated the right of adjudicating upon the nature of the matrimonial contract, have uniformly rejected such covenants as insignificant in a plea of bar, and leave it to other courts to enforce them, so far as they may deem proper upon a more favorable view (if they entertain it) of their consistency with the principles of the matrimonial contract." Mortimer v. Mortimer, 2 Hagg. Consist. 310, 318. In 1821 a bill in equity was brought for the cancellation of separation deeds upon the ground that they were contrary to the policy of the law and void. The bill was dismissed for the reason that, if the plaintiff's contention was sound, it was as good a defense to the deed at law as in equity. Lord Eldon, again considering the question at some length, said: "I perceive that it seems to have struck every one as extraordinary that such deeds should ever have been supported. * * * It has always seemed to me very difficult to hold these deeds legal. It seems to be admitted that a mere agreement to live separate is one that would not be deemed valid; and it seems strange, as Sir William Grant observes, that, if the primary object be vicious, these auxiliary provisions should be held good, and thereby the objects which the law objects to should be carried into effect." Westmeath v. Westmeath, Jac. 126, 141, 142. Other chancery judges entertained different views. Upon demurrer to a bill brought to recover arrears of an annuity due under a separation agreement, Richards, lord chief baron of the

exchequer, said: "The question is not what the law ought to be, but what it is; and the opinions of judges, however great and learned, are not to be put in competition with decisions determining the point and settling the law." Baron Graham said: "The language of regret is certainly found to be used by many of the judges; but the law is clearly established, and such demands have been constantly enforced." Notwithstanding this declared confidence in the settled state of the law, the chief baron also said that the case involved "a grave question, of too great importance to be disposed of on demurrer." Ros v. Willoughby, 10 Price, 2, decided in 1822. Cases following soon after this held that separation deeds are valid, so far as they relate to an annuity for the wife (Jee v. Thurlow [1824], 2 Barn. & C. 547; Wilson v. Mushett [1832], 3 Barn. & Adol. 743); but invalid if the separation does not take place until a future day. Hindley v. Westmeath (1827), 6 Barn. & C. 200. In 1835 the question first came before the house of lords. A Scotch nobleman had obtained a divorce from his wife in the courts of that country, and one question was whether the wife was within the jurisdiction of the court, and duly served with process. The decision turned upon the fact as to her residence, and, as she was living apart from her husband under a separation agreement, it was argued that she was no longer domiciled where he was. In speaking of the agreement, Lord Brougham said: "What is the legal value or force of this kind of agreement in our law? Absolutely none whatever, in any court whatever, for any purpose whatever, save and except only one,—the obligation contracted by the husband with trustees to pay certain sums to the wife, the *cestui que trust*. In no other point of view is any effect given by our jurisprudence, either at law or in equity, to such a contract. No damages can be recovered for its breach; no specific performance of its articles can be decreed. No court, civil or consistorial, can take notice of its existence. So far has the legal presumption of cohabitation been carried by the common-law courts that the most formal separation can only be given in mitigation of damages, and not at all as an answer to an action for criminal conversation, the ground of which is the alleged loss of comfort in the wife's society; and all the evidence that can be adduced of the wife's living apart, and all the instruments that can be produced binding the husband to suffer the separate residence of his wife,—nay, even when he has for himself stipulated for her living apart, and laid her under conditions that she should never come near him,—all is utterly insufficient to repel the claim which he makes for the loss of her society, without doing any act either in court or *in pais* to determine the separation agreement." Lord Lyndehurst said: "The strongest articles of separation may be drawn up and signed with full acquiescence of the husband and wife, yet he may sue her and she may sue him notwithstanding." Warrender v. Warrender, 2 Clark & F. 488, 527, 561. In the same year the case of Waite v. Jones, 1 Bing. N. C. 656, was decided in the court of common pleas. The plaintiff sued for money agreed to be paid in consideration of his executing a deed of separation from his wife. The defense was that the promise to execute the deed was illegal, and vitiated the whole agreement. The court held that agreements for future separation, or promises of payments to induce the same, are illegal; but that an agreement for a present separation may be valid. It was admitted that a promise to separate, in consideration of a sum of money, was not binding; but this agreement was upheld because it might be inferred that the separation had already taken place, and it did not affirmatively appear that this promise induced such action. Upon appeal to the exchequer chamber, the decision was affirmed by a divided court. Lord Denman, C. J., dissenting, disapproved of separation deeds, and said: "If I could venture to lay down the principle which alone seems to be safely deducible from all these cases, it is this: That when a husband has by his deed acknowledged his wife to have a just cause of separation from him, and has covenanted with her natural friends to allow her a maintenance during separation on being relieved from liability to her debts, he shall not be allowed to impeach the validity of that covenant." Jones v. Waite, 5 Bing. N. C. 341. The judgment was affirmed in the house of lords, and the contract was upheld in a brief opinion. Jones v. Waite (1842), 4 Man. & G. 1104.

From this time on it seems to have been the law of England that such contracts are enforceable except as to the one provision, which is of their essence. Courts accepted the rule, while acknowledging the lack of reason for it. "It is in vain to regret the perplexities in which courts have found themselves involved by enforcing the minor and auxiliary parts of the agreement to separate, while they profess to repudiate the principal and essential part and motive of it." Frampton v. Frampton (1841), 4 Beav. 287, 293. In 1848 the house of lords held unequivocally that a separation agreement is a valid contract, and specific performance of the covenants of the deed was decreed. Wilson v. Wilson, 1 H. L. Cas. 538. The case goes solely upon the ground of recent decisions, admitting that the holding is opposed to earlier precedents. The deed was made to settle the wife's suit for nullity in the ecclesiastical court, and the case might have been distinguished on that ground. Shortly after this Lord Romilly, master of the rolls, enjoined the breach of a covenant not to interfere with the wife, who was living separate. The upholding of separation deeds "in a great number of cases" is the only reason assigned for the decision. Sanders v. Rodway (1852), 16 Beav. 207. The doctrine of these later cases was not wholly approved of, and in 1858 the court declared that the very basis of the contract was an agreement which could not be enforced in any court. Vansittart v. Vansittart, 2 De Gex

& J. 249. In most cases, however, the general tendency towards upholding the agreement was followed. Webster v. Webster, 1 Smale & G. 489; Randle v. Gould, 8 El. & Bl. 457; Williams v. Baily, L. R. 2 Eq. 731; Rowley v. Rowley, L. R. 1 H. L. Sc. 63; Gibbs v. Harding, L. R. 8 Eq. 492. Lord Chancellor Westbury, in 1862, enjoined a suit for restitution which had been begun in the divorce court, contrary to the stipulation of a separation deed. The divorce court had succeeded to the jurisdiction of the ecclesiastical court in 1857 (20 & 21 Vict. ch. 85), and administered the law in a similar manner. *Id.* § 22. The chancellor justified the decision by reasoning that separation deeds were valid, although the ecclesiastical doctrine was different, because by a statute of Henry VIII. the ecclesiastical law was subordinated to the common law; that the decision of the house of lords in Wilson v. Wilson, 1 H. L. Cas. 538, overruling the earlier cases, must be treated like a statute, and that while a voluntary separation was an offense against the ecclesiastical law, it was not one against the common law, and therefore the rights in controversy were only private, and public policy was not involved. Hunt v. Hunt, 4 De Gex, F. & J. 221. The case was appealed to the house of lords, but no decision was rendered, as Mrs. Hunt died *pendente lite*. See Brown v. Brown, L. R. 7 Eq. 185, 191. The reasoning of this case does not seem to have been followed, but its conclusions have been adopted. In 1879 Sir William Jessell, master of the rolls, treated the question as settled by the later cases. "For a great number of years both ecclesiastical judges and lay judges thought it was something very horrible, and against public policy, that husband and wife should agree to live separate; and it was supposed that a civilized country could no longer exist if such agreements were enforced by courts of law, whether ecclesiastical or not. But a change came over judicial opinion as to public policy, and other considerations arose, and people began to think that, after all, it might be better and more beneficial for married people to avoid in many cases the expense and the scandal of suits of divorce by settling their differences quietly by the aid of friends out of court, although the consequence might be that they would live separately; and that was the view carried out by the courts when it became once decided that separation deeds were not *per se* against public policy." Besant v. Wood, 12 Ch. Div. 605. In that case the agreement provided that each party should have the custody of one child. Afterwards the father sued for and obtained custody of the one with the mother, the court treating the agreement touching that subject as void. Thereupon the wife sought to renew cohabitation, "but the court deemed that the policy of the law made her agreement for separation controlling over her, and the consideration for it void as to him. This exquisitely refined principle of high honor does not pertain to the laws of so young a people as we are." 1 Bish. Mar. & Div. § 634a, note. In the same year it was again decided that an agreement not to demand restitution of conjugal rights is a valid contract, and that, since by the judicature act of 1873 all defenses are made available in the divorce courts that would be available in equity, the covenant is a bar to proceedings for restitution. Marshall v. Marshall, 5 Prob. Div. 19. Finally, in 1888, it was decided that a trustee is no longer necessary, and that the parties may make the contract directly with each other. McGregor v. McGregor, L. R. 20 Q. B. 529. This decision is expressly put upon common-law grounds, and in no way depends upon statutes enlarging the powers of married women.

It appears that the present position of the English courts has been reached by means of a gradual abandonment of common-law doctrines. It originated in the undoubted proposition that an agreement by the husband to support his wife is not in violation of marital obligation, but a part performance of the duties thereby imposed. From this has come the whole elaborate system of annuities and other property arrangements, each finding its real, if not ostensible, consideration in an agreement to live separate. For a time some other consideration was always shown, as, for example, the promise of a third person to furnish support to the wife. Later this concession to the old law was abandoned, and while courts acknowledged the inconsistency of their position, they enforced property arrangements that depended solely upon a principal agreement which was declared to be invalid. Nor did fallacious reasoning stop here. The argument next advanced was, that while it was true courts in words denied the validity of these agreements, by judgments enforcing provisions dependent upon them, the judges really decided that separation agreements were good contracts. It was not without some vigorous protest that this line of argument was accepted as sound, but it finally prevailed. In one phase after another it was adopted, until now it seems to be held that as to everything but the right to remarry, the parties may divorce themselves. This wide departure from the common law has been induced by conditions which do not exist here. The arrangement of property matters through trustees, which forms so large a part of English conveyancing that half of the property in England is vested in nominal owners (2 Kent, Comm. 182), is practically unknown in this state. It is to the conveyancers, and their eagerness in seizing upon each new opportunity for arranging property matters, that the present results are largely due. Running through many of the opinions is found the idea that these conveyances are now so common that the titles to large amounts of property depend upon them, and therefore they cannot safely be disturbed. Another fruitful source of such agreements was that there was practically no divorce from the bonds of matrimony in England. These causes do not exist here. The decisions which

were in part induced by such conditions, and in part by the notions of the times as to "social policy" (Wennhak v. Morgan, 20 Q. B. Div. 635), are not authority here when in conflict with the common law. The doctrine adhered to by Lord Kenyon, that if changes in the law are needed, they must be made by the legislature, still prevails in this state. The modern English rule has not been generally adopted in this country. Few, if any, American courts have ever gone so far as to enforce an agreement to live in separation, or have even sustained covenants incident to such an agreement, except upon facts assumed to be sufficient to avoid a holding that the promise to live apart is valid. In a few states it is declared that these agreements are wholly void. Collins v. Collins, 62 N. Car. 153; Simpson v. Simpson, 4 Dana, 140, 142. The general doctrine of these cases does not seem to differ materially from that of most of the American authorities, but the application of the rule to contracts in part dependent upon an illegal covenant is more logical and satisfactory. Some of the late decisions in New York approach more nearly to the modern English theory than those in other states. The great number of reported cases in which these agreements are involved in one way or another, shows that they have come to be in common use there. As in England, the law supporting them has developed from small beginnings. In 1811, in the case of Baker v. Barney, 8 Johns. 72, it was decided that a husband who had provided suitably for a separated wife, was not liable for goods thereafter furnished to her, but that in the absence of such provision he was liable for necessaries, in spite of her agreement to the contrary. There was no discussion of the validity of agreements to live separate, and the case is disposed of in a brief *per curiam* opinion. Two years later it was relied upon as an authority for the proposition that upon the execution of a separation agreement the marriage union "essentially ceased," and therefore the husband and wife were competent witnesses for or against each other. Fenner v. Lewis, 10 Johns. 38. The weight of this case is much lessened by the later opinion of the then chief justice. "The general principle is established that the law does not authorize or sanction a voluntary agreement for a separation between husband and wife. * * * A private separation is an illegal contract, a renunciation of stipulated duties from which the parties cannot release themselves by any private act of their own. * * * Nothing can be clearer or more sound than this conjugal doctrine." 2 Kent, Comm. 176, note "b." It was next held that a bond for separate maintenance, which was assumed to be based upon a contract to continue to live apart, was valid and enforceable so long as the separation continued. Baker v. Barney, 8 Johns. 72, was relied upon, and no distinction was noted between agreements which do and those which do not depend upon a covenant to live apart. Shelthar v. Gregory (1829), 2 Wend. 422. Relying upon these cases, Chancellor Walworth, although joining in Lord Eldon's expressions of regret at the state of the law, held that an agreement for an immediate separation was valid if made through a trustee. Carson v. Murray (1832), 3 Paige, 483. The opinion also stated that a return to cohabitation would restore the husband to all his marital rights. The logic by which it is held that the mere agreement to live apart is invalid, and that the covenant as to maintenance can be sustained only through a trustee, leads inevitably to the conclusion that the covenant does not in any way affect marital rights. When it is also held that a return to cohabitation restores such rights, and puts an end to the contract with the trustee, it becomes evident that the true reason which led the court to sustain the agreement in the first instance was not given. If the covenant did not affect marital rights, its rescission could not restore them. If the rescission of the covenant was a necessary accompaniment of the restoration of marital rights, its original execution must have had to do with taking them away. This decision fairly illustrates the course taken in other cases in the court of chancery. Rogers v. Rogers, 4 Paige, 516; Heyer v. Burger, Hoff. Ch. 1; Champlin v. Champlin, *Id.* 55; Anderson v. Anderson, 1 Edw. Ch. 380; People v. Mercein, 8 Paige, 47. These cases were not always approved of. In Mercein v. People, 25 Wend. 64, 77, Justice Bronson said: "It is well worthy of consideration whether all agreements based on the voluntary separation of husband and wife are not contrary to law, and absolutely void." Chief Justice Nelson, in delivering the opinion of the court denying to such an agreement the effect of placing the wife on the footing of a *feme sole* as to suits at law, said that in courts of law the agreement was "condemned as waste paper by the soundest principles of policy, morality and law." Beach v. Beach, 2 Hill, 260. In many of the later cases agreements for support and as to property have been upheld, apparently without much regard as to whether they in fact depended upon a covenant to continue to live separate (Carpenter v. Osborn, 102 N. Y. 552, 7 N. E. Rep. 823; Pettit v. Pettit, 107 N. Y. 677, 14 N. E. Rep. 500; Galusha v. Galusha, 116 N. Y. 635, 22 N. E. Rep. 1114, 6 L. R. A. 487; Clark v. Fosdick, 118 N. Y. 7, 22 N. E. Rep. 1111, 6 L. R. A. 132), until the court declared in terms that "it is settled in this state that a contract between a husband and wife who have separated, to thereafter live apart, is not void on the ground of public policy." Duryea v. Bliven, 122 N. Y. 567, 25 N. E. Rep. 908. This proposition is perhaps modified or explained by the very recent opinion in which the court said that "it must be borne in mind that a contract between husband and wife is void at law, and upheld solely in equity, and then not in every case, but only when the provision for the maintenance of the wife or children is suitable and equitable." Hungerford v. Hungerford, 161 N. Y. 550, 553, 56 N E. Rep. 117, 118. In some other

late cases agreements of this sort are disproved of. Poillon v. Poillon, 49 App. Div. 341, 63 N. Y. Supp. 301; Whitney v. Whitney, 4 App. Div. 597, 36 N. Y. Supp. 891, 39 N. Y. Supp. 1136; Friedman v. Bierman, 43 Hun, 387.

In Massachusetts, actions to enforce the husband's agreement to pay money to or for a separated wife have been sustained. Page v. Trufant, 2 Mass. 159; Holbrook v. Comstock, 16 Gray, 109; Fox v. Davis, 113 Mass. 255. The question of the validity of such an agreement when inseparable from a covenant to continue to live apart arose in Albee v. Wyman, 10 Gray, 222. The court considered the English rule to be open to grave objections, and disposed of the case upon other grounds. In a recent case the agreement was sustained because the covenant to pay money for support was separable from others which were objectionable. Grime v. Borden, 166 Mass. 198, 44 N. E. Rep. 216.

In the United States courts agreements for a separate maintenance are upheld. Whether they would be if they depended upon an agreement to continue to live apart is a question the court was not called upon to consider, and it declined to discuss the subject in any aspect the case did not present. Walker v. Walker. 9 Wall. 743, 19 L. Ed. 814.

The question was early before the Connecticut court, and gave rise to much discussion. It was finally decided, by a vote of five to four, that a contract for separate maintenance was valid if made for what the court termed "proper cause"; and that, while "there may be cases of separation by agreement, attended with such circumstances and resting on such foul principles that good policy will not support them, * * * when a case is claimed to be of that description it is incumbent on those who claim it so to show it." Nichols v. Palmer, 5 Day, 47, 52, 53. A discretionary power of this kind is broad, and somewhat novel. The practical result of exercising it would be what is set forth in one of the dissenting opinions: "It is true, it has been said, that such separations should be admitted only in cases of the most urgent necessity, and for the strongest reasons; but no line of demarcation can be drawn. This decision proclaims to all who are married that they have the right to separate by mutual consent, as to whim, fancy, or passion may dictate." *Id.* 60. The true rule is stated in the dissenting opinion of Judge Ingersoll: "The marriage contract cannot, *ad libitum*, be dissolved by the parties. Nay, I presume in every case application must be made to a forum appointed by law for the purpose, to effect a dissolution. It follows, then, of course, that every agreement the consideration of which is the dissolution, or the intended dissolution, of the marriage contract, is void, and cannot be enforced in a court of justice. What, then, is a dissolution of it? I should suppose an agreement to live separately, and to perform none of the duties to each other, which they solemnly promised to perform when the marriage took place, is a dissolution of the contract, so far as the parties can dissolve it. If this be a just position, every agreement to carry into effect such separation must be against the law. The agreement in question, being made to carry into effect such separation, by fair logical deduction, is against law and void." *Id.* 61. In a recent case the court of that state said of these contracts: "The principle upon which they are sustained is, not that the separation should be enforced, nor that it is lawful for the parties to contract to separate, but that when they are living apart for causes rendering such separation reasonably necessary the agreement of the husband to perform his duty to furnish support for his wife should be carried out." Boland v. O'Neil, 72 Conn. 217, 44 Atl. Rep. 15. "After a marriage is entered into, the relation becomes a *status*, and is no longer one resting merely on contract. It is the relation fixed by law in which the married parties stand to each other, toward all other persons, and to the state. And it is a relation from which the persons cannot separate themselves by their own agreement, or by their own misconduct. This *status* can only be dissolved between living parties by the assent of the state, which is ordinarily indicated by the judgment of a competent court. When an attempt is made through the courts to undo a marriage, the state becomes in a sense a party to the proceedings, not necessarily to oppose, but to make sure that the attempt will not prevail without sufficient and lawful cause shown by the real facts of the case, nor unless those conditions are found to exist at the time the decree is made upon which the state permits a divorce to be granted. The state has an interest in the maintenance of the marriage ties, which neither the collusion nor the negligence of the parties can impair." Andrews, C. J., Allen v. Allen (Conn.), 46 Atl. Rep. 242, 49 L. R. A. 142. According to these decisions, the present law of that state is more nearly expressed in the dissenting opinions in Nichols v. Palmer, 5 Day, 47, than in the prevailing ones.

That a contract simply for separate maintenance is valid may be said to be the general American rule. Randall v. Randall, 37 Mich. 563; Henderson v. Henderson (Oreg.), 60 Pac. Rep. 597, 48 L. R. A. 766; Emery v. Neighbour, 7 N. J. Law, 142; Aspinwall v. Aspinwall, 49 N. J. Eq. 302, 24 Atl. Rep. 926; Phillips v. Meyers, 82 Ill. 67; Luttrell v. Boggs, 168 Ill. 361, 48 N. E. Rep. 171; Dutton v. Dutton, 30 Ind. 452; Robertson v. Robertson, 25 Iowa, 350; Carey v. Mackey, 82 Me. 516, 20 Atl. Rep. 84, 9 L. R. A. 113; Roll v. Roll, 51 Minn. 353, 53 N. W. Rep. 716; Helms v. Franciscus, 2 Bland, 544; Squires v. Squires, 53 Vt. 208; Gaines' Admx. v. Poor, 3 Metc. (Ky.) 503; Chapman v. Gray, 8 Ga. 341; McLaren v. Bradford, 52 Ga. 648; Garver v. Miller, 16 Ohio St. 527; Hutton v. Hutton's Admr., 3 Pa. 100; Buckner v. Ruth, 13 Rich. Law, 157; Goodrich v. Bryant, 5 Sneed, 325; Bowers v. Hutchinson, 67

Ark. 15, 53 S. W. Rep. 399. In most of the cases where the question has been discussed the decisions have been put upon grounds other than that of upholding an agreement to live separate. In a few cases courts have been misled by the fact that an agreement to maintain is valid into supposing that one to live separate is equally so. Even these courts agree that, if there be a covenant for future separation, the whole deed is void. Yet this has no more tendency to promote a method of living not approved by law than an agreement to continue a present separation. The distinction, so far as one exists, originated from the rule that a mere agreement to maintain a separated wife was all that was at first recognized. This was put upon the ground that the husband's agreement was one to do what was a part of his duty. It was not the fact that the agreement depended upon an existing separation, but that it neither depended upon nor induced separation of any kind, either present or prospective, that made it a valid contract. When there was an existing separation, conveyancers were skillful enough to so draw the agreement that it appeared free from objectionable features, and so it would be upheld; but, when there was only a contemplation of separation, this was not so easily accomplished. The real motive and consideration then appeared in the contract, and for this cause it would be condemned by the court. Hence it came to be thought that, if the parties had actually separated, they might make a legal contract to continue to live apart. "Out of these propositions, namely, that married parties cannot validly contract to live in separation, yet the husband can obligate himself to render her a maintenance wherever she resides, comes the entire doctrine of separation under articles. When we look at the cases we find that they are sometimes discordant, and sometimes the particular decision proceeded on a misapprehension of true legal distinction; but, on the whole, the law as adjudicated is plainly so in our country, and it was so in England until of late, however it may be there now." 1 Bish. Mar. & Div. § 633. This doctrine is the only one which can be sustained if it be conceded that the marital *status* is one in which the state has an interest, and over which it may exercise a control. No intermediate rule ever has been or can be justified by any process of reasoning. If it be true that the rights involved are only private, why stop at the right of remarriage, or object to decrees of divorce by agreement? If it is good law that by their own act husband and wife may cease to sustain that relation, and may thus become as strangers, what is the principle that forbids one of them to remarry? No answer to these questions has been vouchsafed. The courts which have announced the extreme decisions have thus far refrained from considering the end to which their logic leads. In avoidance of these questions and similar ones asked long ago by Lord Kenyon, it is said that public sentiment has changed, social policy is different, and courts must fashion the law to the demand of the times. However satisfactory this line of argument may be in England, it cannot be followed here. "To declare what the law is or has been is a judicial power; to declare what the law shall be is legislative. One of the fundamental principles of all our government is that the legislative power shall be separate from the judicial." Dash v. Van Kleeck, 7 Johns. 477, 498. The authorities in this state, so far as they have touched upon the question, follow the common law. In Pidgin v. Cram, 8 N. H. 350, the husband and wife had separated, and the wife was living with her father, who had covenanted with the husband to support her. It was decided that this agreement did not free the husband from his obligation to support his wife. So long as its covenants were performed, he would not be liable for goods furnished to her, because he was in this way performing his duty. If, however, she should be driven from her father's house by the inmates thereof, the husband would be liable to one who thereafter supplied her with necessaries. Unless she leaves his house against his will, he is bound to support her, and she takes his credit with her. Town of Rummey v. Keyes, 7 N. H. 571; Allen v. Aldrich, 29 N. H. 63. Sayles v. Sayles, 21 N. H. 312, was a suit upon a note given in consideration of a promise not to contest a libel for divorce. Justice Wood said: "No such agreement, even if executed, can form a valid consideration for either a verbal or written promise. The great and principal object of the agreement made between the parties was to bring about a dissolution of the marriage contract, and to put an end to the various duties and relations resulting from it. Any contract having any such purpose, object, and tendency cannot be, in law, sustained, but must be regarded as being against sound public policy, and consequently illegal and void. The marriage relation is one to be encouraged and maintained when formed. Such is the well-settled policy of the law; and its dissolution or determination is not to be left to depend upon the caprice of the parties. If determined, it must be done in accordance with some positive enactment of law, and in due course of judicial proceedings. The good order and well-being of society require this." The then recent cases upholding separation agreements were reviewed, but no opinion of their soundness was expressed beyond the suggestive statement that "in this state, at least, a separation *a vinculo* can only be effected through a decree of the courts of law." From this it may well be inferred that the court did not consider those cases as in harmony with the law here. Similar views of the nature of the *status* have been expressed in other cases. Clark v. Clark, 10 N. H. 380; Cross v. Cross, 58 N. H. 373; Cross v. Grant, 62 N. H. 675. So far as the English ideas are outgrowths of the early form of divorce *a mensa et thoro*, they are not applicable here. Limited divorces were never granted

in this state. Parsons v. Parsons, 9 N. H. 309, 317. As early as 1791 absolute divorces were here granted for the causes for which limited divorces were granted under the English practice. Act Feb. 17, 1791; Laws, 1805, p. 280. In no reported case in this state has an agreement to live separate been passed upon favorably. What has been said upon the subject has uniformly been opposed to the validity of such a contract, The theory that marriage is only a civil contract is also disapproved of. "It is an institution of society, having its foundation in civil contract." Cross v. Grant, 62 N. H. 675, 684. The whole doctrine is summed up by Chief Justice Doe in a single sentence: "The marriage contract may be broken by either party, with or without the consent of the other; but it cannot be rescinded or modified by them." Ferren v. Moore, 59 N. H. 106. It is not necessary to now consider how far the statutory power of husband and wife to contract as to property matters extends, or whether their agreement to release prospective rights in each other's estates could, in any event, be enforced. Compare Shute v. Sargent, 67 N. H. 305, 36 Atl. Rep. 282, with Reed v. Blaisdell, 16 N. H. 194; Cutter v. Butler, 25 N. H. 343; and Hayes v. Seavey, 69 N. H. 308, 46 Atl. Rep. 189. Conceding that the right extends to the release of every property interest, present and prospective, it cannot avail this plaintiff. Modern legislation enlarging the rights of married women as to contracts and torts has not destroyed the marital *status*, as defined by the common law. "There is nothing in the series of statutes by which her rights and privileges have gradually approximated an equality with those of her husband that abrogates the marital rights of trust and confidence incident to the relation in all stages of society. * * * The obligations, the disabilities, and the privileges inherently consesequent upon the married union remain unchanged. * * * While unjust disabilities of the wife have been removed, there are implied stipulations of the contract which each party remains justly disable to violate." Laton v. Balcom, 64 N. H. 92, 95, 96, 6 Atl. Rep. 37, 39, 40. "The incidental changes of conjugal rights and duties are such only as are reasonably and necessarily implied." Gross v. Grant, 62 N. H. 675, 685. "These statutes have not taken away the right of either party to the marital contract to have the affection, society, and aid of the other." Ott v. Hentall (N. H.), 47 Atl. Rep. 80. An agreement renouncing marital rights is void. An agreement touching property rights may be valid. If covenants of each kind occur in the same agreement, its validity must be determined by the ordinary rules. If the promises are separate, and the consideration divisible, the legal part of the contract is upheld; but if the consideration is entire the whole must fail. Bixby v. Moor, 51 N. H. 402. Applying this test to the agreement in the present case, the result is at once apparent. The husband agreed to separate on friendly terms, and to make no demand on the wife nor her property after that date. The wife made a similar agreement on her part. The agreement to live separate is not distinct from that as to property. There is no separate promise, upon separate consideration, as to the legal and illegal parts. They are blended together without discrimination. The wording of the writing and the facts surrounding the separation all tend to show that the dissolution of the marriage relation was the object the parties had in view. All other matters were merely incidental to this main purpose. The agreement was an attempt by a husband and wife to do that which the court could not have done, either upon the application of one of the parties or with the consent of both. They were desirous of dissolving the marital relation; and, although no cause for divorce existed, they entered into this agreement, whereby each attempted not only to release all the rights then held as against the other, but also to absolve the other from all duties attendant upon the married state. It is not an agreement made up of distinct parts, but a harmonious whole, the main object of which is the dissolution of the marriage tie. It had its inception in the wife's declaration of her intention to leave her husband's house. The agreement as to property is merely incidental, while anything in the nature of a provision for the support of the wife is wholly lacking. It is hardly open to doubt that if they had intended to continue to live as husband and wife, they would not have contracted as to property rights. In any event, it does not appear that there would have been such a contract, or that the agreement on that subject is independent of the illegal promise to separate. "Whether the illegality extends to the whole or only a part of the consideration is immaterial. The contract was entire, and in such case the whole is void if tainted with illegality in any part." Weeks v. Hill, 38 N. H. 199, 203; Hinds v. Chamberlin, 6 N. H. 225, 227. The executor also contends that his first reason for appeal that the defendant has no interest in the estate is well-founded, because the husband "willingly abandoned his wife, and has absented himself from her, or has willfully neglected to support her * * * for the term of three years next preceding her death." Pub. Stat. ch. 185, § 18. The object of this statue is to deprive a wrongdoer of certain rights which he would otherwise possess. It applies to a "deserting husband," (Martin v. Swanton, 65 N. H. 10, 11, 18 Atl. Rep. 170, 171), and there is no desertion where there is a separation by agreement. Moores v. Moores, 16 N. J. Eq. 275, 280; 1 Bish. Mar. Div. & Sep. § 1662. There was here no abandonment and no willful neglect to support, in the sense in which those terms are used in the statute. There was do denial by the husband of any right which the wife desired to enjoy. She was not abandoned, but merely permitted to go the way of her own choosing. She was not willfully neglected, but was left to her own resources at her own request.

NOTE.—The opinion of Justice Peaslee in the principal case is so exhaustive, both of American and English authorities, that an annotation is hardly necessary. The question of the the right of husband and wife to contract to live separately, and the validity of other provisions in the contract relating to property rights has been often discussed and the value of this opinion lies, not so much in the extended citation of authorities, but in the strong reasoning of the court in showing the fallacy on which many of the earlier cases were decided, and in announcing what it believes to be the rule commended by the wisest public policy. It is seldom that such a painstaking and learned opinion is delivered by the courts of the present day, and we assert our belief that it will repay the most careful study.

JETSAM AND FLOTSAM.

THE MEANING OF "HUMPH."

The case Powell v. M'Glynn and Bradlaw, which was recently passed upon by the Irish court of appeal, turned principally upon the question whether the word "humph," used in answer to a question, was a term of assent or dissent. The action was for damages caused by the negligence of M'Glynn in driving a horse and trap belonging to Bradlaw. The plaintiff sought to fix liability on Bradlaw by showing that M'Glynn, who was Bradlaw's servant, was at the time of the accident acting as a servant within the scope of his authority. Evidence was introduced to the effect that in response to the question put by the plaintiff's sister, "I believe you lent your pony and trap (to M'Glynn)?" Bradlaw said "Humph." On the trial below the jury rendered a verdict holding Bradlaw liable for the act of his servant. On a motion for a new trial the judges of the king's bench division were divided, two of them, Lord O'Brien and Mr. Justice Barton, holding that no liability attached to Bradlaw, while Mr. Justice Madden and Mr. Justice Boyd refused to disturb the jury's verdict. Mr. Justice Barton, in speaking of the meaning of the word "humph," said: "I do not think it has yet gained such an established meaning in our language as to enable us to rest a judicial decision in a serious case upon its signification. I can hardly conceive any witness being indicted for perjury for having falsely sworn that any one had said 'Humph.'" Mr. Justice Madden in his opinion said: "If it were necessary to interpret it, I should not feel sufficient confidence in my literary judgment to push aside the authority of the New English dictionary, which describes the word 'humph' as an expression of doubt or dissatisfaction. But the question is not what 'humph' means, but what it does not mean. And it is no more an expression of assent, or an adoption of the statements or sentiments by which it is elicited than was Mr. Burchell's 'Fudge.'" The court of appeal sustained the position of Lord O'Brien and Mr. Justice Barton.

BOOK REVIEWS.

AMERICAN BANKRUPTCY REPORTS, VOLUME 5.

With their usual promptness the publishers have issued this volume, about six months having elapsed since the publication of volume 4. As to the value of these volumes to lawyers who have bankruptcy cases we can only repeat what we said in our issue of February 8. The same well classified index appears as alluded to in our review of volume 4, subdivided under the following heads: acts of bankruptcy, appeals and reviews, arrest, assets, assignment, assignee, attachments, attorney, bankruptcy and bankrupts, claims, set-off, composition, concealment of assets, contempt, corporations, costs, creditors, creditors' bill, creditors' meetings, discharge, evidence, exemptions, false oaths, fixtures, fraud, insolvency, insurance policy, jurisdiction, laborer, liens, limitations, mercantile agency, notice, partners and partnerships, perjury, pleading and practice, pledge, preference, priorities, receiver, sales, state insolvency laws, stay, trustee, witness. This index is very full, and is really a digest of the contents of this volume. This volume contains the usual number of annotations to the cases published, which are very full, also a table of cases. The authors are William Miller Collier and James W. Eaton. This book contains 935 pages, bound in law sheep. Published by Matthew Bender, Albany, N. Y.

WEEKLY DIGEST.

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCIDENT INSURANCE—Hazardous Employment—Increased Risk.—Where an answer to a suit on an accident policy insuring plaintiff's decedent as a roundhouseman alleged that the policy provided that, if assured was injured in any occupation classed by the company as more hazardous than a roundhouseman, the company's liability should be for such principal sum or weekly indemnity as the premium paid by defendant would purchase at the rate fixed for such increased hazard, and averred that the premium per $1,000 for roundhousemen was $15, and that for firemen, the duties of which deceased was exercising when injured, was double that charged for roundhousemen, and that no part of decedent's duties as a roundhouseman required him to act as a fireman, such plea sufficiently pleaded that defendant classed the occupation of fireman as more hazardous than that of roundhouseman, and hence it was error for the court to charge that the question of diminution in the amount of plaintiff's recovery depends on whether or not the occupation of fireman was more hazardous than that of roundhouseman in fact, and not on whether it had been so classed by defendant.—FIDEL-

ITY & CASUALTY CO. OF NEW YORK v. JONES, Tex., 62 S. W. Rep. 927.

2. ADMIRALTY—Seaman's Wages—Lien—Minor Son of Master.—A 16 year-old son of the captain of a schooner, employed thereon, is not entitled to a lien on the vessel for seaman's wages.—THE JOHN T. WILLIAMS, U. S. D. C. (Conn.), 107 Fed. Rep. 750.

3. ADVERSE POSSESSION.—What defendant said with reference to giving the right to others to enter upon the land in dispute and cut trees upon it was admissible in his favor as a part of the *res gestæ* the conversations having occurred within the disputed boundary.—MANN v. CAVANAUGH, KY., 62 S. W. Rep. 834.

4. ARSON—Indictment—Sufficiency—Malice.—Rev. St. 1899, § 1875, provides that every person who shall willfully set fire to or burn any public building belonging to any county, not the subject of arson in the first or second degree, shall on conviction be adjudged guilty of arson in the third degree. Held, that an indictment that defendants did then and there willfully and feloniously set fire to and burn a public building belonging to the county was sufficient, without averring that burning was malicious.—STATE v. MCCOY, Mo., 62 S. W. Rep. 991.

5. ATTORNEY AND CLIENT—Claims Against Government—Fees.—Under the Indian depredation act (Acts Cong. March 3, 1891, ch. 538, p. 854), providing that the court shall fix the amount of fees to be paid attorneys of claimants, and make them part of the judgment, an agreement of a claimant to pay his attorney a certain per cent. of the amount of recovery above the fee which the court was prayed to allow violates the policy of the act, and is void.—LYNCH v. POLLARD, Tex., 62 S. W. Rep. 945.

6. BANKRUPTCY—Insolvent Firm—Exemptions of Personalty.—Const. N.Car.art. 10, § 1, allowing exemptions of personalty to an insolvent debtor in that state, does not contemplate that the same shall be duplicated by allowing him the exemption both from his individual estate as well as from his interest in an insolvent partnership; and hence in voluntary bankruptcy proceedings by the firm he should not be allowed the exemption out of the firm assets, unless it appears that he has no individual personal property exemption exclusive thereof.—IN RE STEED, U. S. D. C., E. D. (N.Car.), 107 Fed. Rep. 682.

7. BANKRUPTCY—Insolvent Lunatic—Guardian Ad Litem—Appointment—Publication of Process.—In bankruptcy proceedings by involuntary petition against the estate of an absent lunatic, an application for the appointment of a guardian *ad litem* will not be delayed because of the omission to publish process, since Bankr. Act 1898, § 18a, requires publication only "in case personal service cannot be made," and the appointment would be necessary notwithstanding.—IN RE BURKA, U. S. D. C., W. D. (Tenn.), 107 Fed. Rep. 674.

8. BUILDING AND LOAN ASSOCIATION—Usury.—Where an applicant for a loan from a building company subscribes for stock to be paid in monthly installments, not as an investment, but as a means to obtain a loan, and the officers know it, such subscription does not make the loan usurious, though the loan bears the full legal rate of interest.—COTTON STATES BLDG. CO. v. RAWLIN, Tex., 62 S. W. Rep. 805.

9. CARRIERS—Injuries to Goods in Transit—Vegetables—Failure to Ice Car.—In an action for damages to a car of vegetables caused by not keeping them sufficiently iced, evidence by the consignor that all the vegetables were fresh from farm wagons, and accepted by his foreman as being in first-class condition, was not hearsay.—FT. WORTH & D. C. RY. CO. v. HARLAN, Tex., 62 S. W. Rep. 971.

10. CHATTEL MORTGAGES—Cattle—Bona Fide Purchasers.—Where defendant's assignors purchased cattle, which they mortgaged to plaintiff and intervener, and defendant thereafter purchased the cattle, the only consideration being his agreement to substitute his obligation and mortgage for those of his assignors, which agreement was not assented to by intervener at the time plaintiff's suit to foreclose was brought, neither defendant nor intervener, whose mortgage was given for a pre-existing debt, was a purchaser for value without notice, so as to entitle either to superior rights over plaintiff's mortgage.—BELCHER v. CASSIDY BROS. LIVE STOCK COMMISSION CO., Tex., 62 S. W. Rep. 924.

11. CHATTEL MORTGAGE—Confusion—Partition.—Where, by reason of the confusion of mortgaged cattle, it was impossible to identify the precise stock covered by each mortgage, it was error for the court to direct the sheriff to partition the herd by seizure and sale as under execution of a certain number of head, the fair average of all the cattle, since the power thus conferred on the sheriff as a ministerial officer was judicial, and one for the court, and not the sheriff, to exercise.—BELCHER v. CASSIDY BROS. LIVE STOCK COMMISSION CO., Tex., 62 S. W. Rep. 924.

12. CONTRACT—Action for Services.—Plaintiff alleged that defendant agreed to pay him certain sums for serving summonses and executions in actions by defendant, to collect poll taxes. Held, that it was error to refuse to allow defendant to file an amended answer setting up the contract between the parties, which was void as against public policy, on the ground that the answer set up no defense.—HADDOCK v. CITY OF SALT LAKE, Utah, 65 Pac. Rep. 491.

13. CONTRACTS—General Denial—Evidence.—Where plaintiffs, who had sold ties to one to whom defendant had sublet a portion of its contract to deliver ties to a railway company, alleged a contractual relation between plaintiffs and defendant, it was proper under a general denial to show that no such relation existed, and that defendant had paid the subcontractor in full for the ties.—HARALSON v. ST. LOUIS S. W. RY. CO., Tex., 62 S. W. Rep. 788.

14. CONTRACTS—Specific Performance—Equity.—A contract agreed that the claimants to the waters of a certain stream should own and use them equally, one-third each, and that a party thereto violating the same should pay the party injured the sum of $1,000. One of the parties sold the land to which his water right was appurtenant to J, who did not assume the obligations of said contract. Held, that specific performance of said contract could not be decreed.—DALY v. JOSSLYN, Idaho, 65 Pac. Rep. 442.

15. CORPORATION—Right to Examine Books—Citation.—In proceedings instituted to enable one interested to examine the books of the company, the defendant excepted, and averred that it had not been cited. The citation was addressed to the manager. The citation should have been addressed to the defendant, and not to its manager.—STATE v. NORTH AMERICAN LAND & TIMBER CO., La., 29 South. Rep. 910.

16. CORPORATIONS—Suit by Stockholder—Mismanagement by Directors.—Where a bill is filed by a stockholder of a corporation to have redress alleged corporate wrongs, without having made a request of the managing body of the defendant corporation to have corrected the grievances complained of, the complainant must aver in his bill the facts constituting his excuse for not making such request with particularity and definiteness, and the averment of conclusions will not suffice, but the facts upon which these conclusions are based must be averred.—LOUISVILLE & N. R. CO. v. NEAL, Ala., 29 South. Rep. 865.

17. CRIMINAL EVIDENCE—Rape—Introduction of Child.—The child of the prosecutrix may be brought into court, in a prosecution for rape, to corroborate the testimony of the prosecutrix, and its birth and identity as the result of the illicit intercourse may be shown, but it cannot be introduced to show a resemblance to defendant.—STATE v. NEEL, Utah, 65 Pac. Rep. 454.

18. CRIMINAL LAW—Animals—Malicious Killing.—Defendant, who had ill feeling toward the owner of a

herd of goats, approached the herd on horseback, and, after frightening the boy in charge into the brush, chased the goats around for some time; and, after he left, the herder found one of them dead, evidently killed by dogs, and dragged into the brush after being killed. Defendant was not shown to have set dogs on the goats, but he was the only person seen about them; and while he was chasing them dogs were heard barking at a residence near by, and a woman was heard setting them on the goats. Held sufficient to justify defendant's conviction of maliciously killing the goat, with intent to injure the owner.—GARZA v. STATE, Tex., 62 S. W. Rep. 751.

19. CRIMINAL LAW — Assault — Instructions.—Where prosecutor and his brother had accused defendant of sending a scurrilous valentine, which mentioned their sisters' names in an offensive manner, and, in the quarrel ensuing, the prosecutor was wounded and his brother killed,—the evidence being conflicting as to defendant's connection with the valentine,—an instruction that the valentine could not be considered by the jury against defendant, unless they found beyond reasonable doubt that he was connected with its production, was erroneous, since it was on the weight of evidence, and authorized the jury to take the valentine as a criminative fact against defendant.—KELLY v. STATE, Tex., 62 S. W. Rep. 915.

20. CRIMINAL LAW—Assault—Right to Seize Property—Mortgage.—Where defendant had a mortgage on certain rugs, authorizing him to take possession of them on default in payment of the purchase money, and, acting on this authority, he entered the house of prosecutrix without her consent, took possession of the rugs, and, when prosecutrix stood in the doorway to prevent him from leaving with them, pushed her forcibly away, he was guilty of an assault; and the provision of the mortgage was no defense, since it only entitled him to take peaceable possession of the rugs.—CULVER v. STATE, Tex., 62 S. W. Rep. 922.

21. CRIMINAL LAW—Concealed Weapons—Evidence.—Defendant testified that he was carrying a pistol for the purpose of selling it to C, and that, after failing to make a sale, he carried it with him to a dance that night. C testified that he saw defendant in the evening before the dance, and that defendant made no mention of any pistol. Held sufficient to support a verdict finding defendant guilty of unlawfully carrying a pistol.—MORALES v. STATE, Tex., 62 S. W. Rep. 751.

22. CRIMINAL LAW — Homicide — Accomplices — Circumstantial Evidence.—Where defendant was accused of being an accomplice to a homicide, and the alleged principal testified that defendant advised him to kill deceased, and gave him a gun for that purpose, there was sufficient direct evidence, so that the case was not wholly based on circumstantial evidence, and the refusal to charge the law applicable to circumstantial evidence was not error.—THOMAS v. STATE, Tex., 62 S. W. Rep. 919.

23. CRIMINAL LAW—Homicide—Provoking Assault.—Accused and his father walked up within 75 yards of deceased, when accused dropped on his knees, leveled his gun at deceased, and called to him to get out from behind a wagon. Accused then ran behind some trees a short distance away, and deceased fired at him, when a general shooting occurred, in which deceased was killed. Held, that an instruction on the law of provoking a difficulty was not warranted.—CASNER v. STATE, Tex., 62 S. W. Rep. 914.

24. CRIMINAL LAW — Murder.—Defendant's husband was shot at night while in bed. They and three small children were the only persons in the house. Defendant claimed it was suicide. On her trial for murder in the first degree, the court instructed the jury that, if they found defendant not guilty as charged they should determine whether she was guilty of a crime included in the one charged; that it was possible to find one of four verdicts, viz., murder in the first degree, murder in the second degree, manslaughter, or not guilty. Held, that such charge was not objectionable as an instruction that there was evidence to support a verdict of murder in either degree or of manslaughter, but, the evidence being purely circumstantial, it was a proper instruction as to the crimes which might be included under the indictment and evidence.—STATE v. CROCKETT, Oreg., 65 Pac. Rep. 447.

25. CRIMINAL LAW—Placing Obstruction on Railroad Track — Instructions.—Where defendants were accused of willfully placing an obstruction on a railroad track, and the court charged that "the meaning of the term 'willfully' is that the obstruction was, by defendants, placed upon said railroad track with an evil intent," such instruction was erroneous, because apt to lead the jury to believe that the court thought defendants did place the obstruction on the track.—STANFIELD v. STATE, Tex., 62 S. W. Rep. 917.

26. CRIMINAL LAW — Rape — Evidence.—Where accused admits carnal intercourse and that he was armed with a pistol, but claims that the act was with prosecutrix's consent, and she denies such claim, and states that she submitted through fear, a conviction for rape will not be disturbed.—MYERS v. STATE, Tex., 62 S. W. Rep. 750.

27. DEATH BY WRONGFUL ACT—Joint Principals—Express Companies.—Sayles' Civ. St. art. 3017, gives an action for injuries resulting in death (a) when the death of any person is caused by the negligence or carelessness of the proprietor, owner, or hirer of any railroad or other vehicle, or by the unfitness, negligence, or carelessness of their servants or agents; (b) when the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another. Held, that where men under the direction of an agent, who was employed jointly by a railroad company and an express company, killed plaintiff's intestate under the mistaken impression that he was about to burglarize the railroad company's building, the express company was not liable under either subdivision of the article, since it was not alleged to be a proprietor, etc., of a railroad, nor were the injuries the result of its own wrongful acts or omissions.—HOUSTON & T. C. R. CO. v. LIPSCOMB, Tex., 62 S. W. Rep. 954.

28. DEATH BY WRONGFUL ACT—Pecuniary Interest in Deceased's Life.—Where decedent, whose death was alleged to have been caused by defendant's negligence, was more than 57 years old, and was being supported by plaintiffs, who were his children, and it appeared that he did no work, and did not contribute to the support of the family, but only carried the dinners for his sons, etc., for which he was given his food and clothes, plaintiffs had no pecuniary interest in decedent's life, for which they would be entitled to recover.—PROCTOR v. SAN ANTONIO ST. RY. CO., Tex., 62 S. W. Rep. 989.

29. DEED—Escrow.—The delivery of a deed in escrow renders it absolute when the condition upon which it was made is fulfilled, and the deed takes effect from the date of the first delivery.—GAMMON v. BUNNELL, Utah, 64 Pac. Rep. 95.

30. EJECTMENT—Case Tried to the Court.—Plaintiffs sued defendants in ejectment. The case was tried without a jury. Defendants claimed that plaintiffs were estopped to claim the land in controversy by acceptance of title to other land under a previous parol partition. Various deeds to the property were introduced and verbal testimony was adduced to show parol partition. No declarations of law were given. Held, that the trial court's judgment for defendants would not be disturbed, since it was impossible, in the absence of such declarations, to determine on what theory of the case the decision rested.—SELL v. BRETTELLE, Mo., 62 S. W. Rep. 988.

31. EQUITY—False Representations — Warranties.—Where a grantee of land sought to have rescinded a note given in part payment of the price on the ground of misrepresentations as to the quantity of the land,

and the grantor pleaded in set-off the difference between the actual area and quality of lands received by it in part payment and the area and quality as represented by the grantee, the latter could not complain that the question of his representations as to his land and the grantor's reliance thereon were submitted to the jury, on the principle that "he who seeks equity must do equity."—SWOPE v. MISSOURI TRUST CO., Tex., 62 S. W. Rep. 947.

32. EVIDENCE—Privileged Communications—Attorney and Client.—Where an accused admitted to bail could not be found, and on investigation by the grand jury it appeared that his counsel was not retained by the accused, but by some person acting for accused, or in his interest, the counsel might be compelled to disclose the name and residence or usual place of abode of such person, but not the interest such person had in the matter.—UNITED STATES v. LEE, U. S. C. C., E. D. (N. Y.), 107 Fed. Rep. 702.

33. EXECUTION—Corporate Stock—Levy on Shares.—Plaintiff attempted to levy on corporate stock belonging to his debtor by procuring an order of attachment of his property, with a clause therein commanding the sheriff to summon the corporation to answer as garnishee. The sheriff executed the order "by delivering a true copy thereof" to the president of the company. Held, under Sand. & H. Dig. § 836, providing that the order of attachment shall be executed by the sheriff by delivering a copy of the order, with a notice specifying the property attached, as to stock in a corporation, to the chief officer thereof; and section 3057, providing that whenever an officer having a writ of attachment shall levy on shares of stock in corporations he shall leave a true copy of the writ with the president, with a certificate that he levies on and takes such shares to satisfy such writ,—that plaintiff acquired no lien on his shares of stock, since, shares of stock being intangible, and not subject to levy at common law, a lien thereon can be obtained only by strict compliance with the statute.—H. B. CLAFLIN CO. v. BREITZFELDER, Ark., 62 S. W. Rep. 905.

34. EXECUTORS AND ADMINISTRATORS — Temporary Administrator — Receiver.—Where plaintiff, after prosecuting an appeal to the district court from an order of the county court refusing to appoint a temporary administrator, filed a bill for the appointment of a receiver, and in vacation the district judge, on consideration of the bill, appointed M as temporary administrator, with power to hold and preserve the estate until further order, M will be treated as a receiver, since a receiver is the only officer the court had authority to appoint in vacation; and the fact that he was designated a temporary administrator was immaterial.—LONG v. RICHARDSON, Tex., 62 S. W. Rep. 964.

35. EXECUTORS AND ADMINISTRATORS — Wrongful Sale—Representative Capacity.—Where plaintiff sued in conversion to recover the value of his property, which had been sold by an administrator as part of the estate, he claimed, not through the estate, but adversely thereto; and hence a presentation of the claim to the administrator, and rejection by him, was not a necessary condition precedent to the right of action.—SCHMITT v. JACQUES, Tex., 62 S. W. Rep. 956.

36. FIRE INSURANCE—Acts Ultra Vires—Estoppel to Deny.—Where the charter of a mutual fire insurance company required all its members to be residents of the state of incorporation, and permitted it to insure property in that state only, the company cannot, where the contract is executed, and the company has received the benefits thereof, defend an action on a policy insuring property in a foreign country by showing its want of power to issue the policy either under the laws of its own state or those of the foreign country.—CONTINENTAL FIRE ASSN. v. MASONIC TEMPLE CO., Tex., 62 S. W. Rep. 930.

37. HIGHWAYS — Dedication — Subsequent Abutting Owners.—Land having been once dedicated by the owner of the soil as a highway, and having been accepted by the public, all subsequent grantees of abutting lands are bound by such dedication, and have no right to obstruct any portion of the street.—SCHETTLER v. LYNCH, Utah, 64 Pac. Rep. 955.

38. HIGHWAYS—Laying Out—Landowner's Title—Estoppel to Deny.—Where a county instituted proceedings to open a road, and a jury of view gave notice to owners of land over which the road was located, the county, by treating an owner of lands as the sole and undisputed owner thereof, was estopped to resist the owner's claim for damages on the ground that the land had been previously condemned and taken for a road identical with the one proposed.—NORTHINGTON v. TAYLOR COUNTY, Tex., 62 S. W. Rep. 936.

39. INTOXICATING LIQUORS—Local Option Election—Declaration of Result.—The fact that plaintiff was a citizen, voter and taxpayer in the school district in which there was an election on the question of local option, did not entitle him to maintain an action to restrain the commissioner's court from declaring the result of the election.—HILL v. ROACH, Tex., 62 S. W. Rep. 959.

40. INTOXICATING LIQUORS—Local Option Law—Local Option District—Boundaries.—Where an indictment for violating the local option law charged the sale in territory described by metes and bounds, a charge that if any person shall sell any intoxicating liquor in any "town" in which the sale of intoxicating liquor has been prohibited, was not erroneous, in that it did not describe the territory as described in the indictment, the town in which defendant sold the intoxicants being within the prohibited territory.—MATKINS v. STATE, Tex., 62 S. W. Rep. 911.

41. INTOXICATING LIQUORS—Seizure and Destruction Thereof—Under Act Feb. 13, 1899, §§ 1, 3, authorizing the seizure and destruction of any intoxicating liquors shipped into any prohibition district for the purpose of sale, and providing that such seizure and destruction shall be a good defense to an action against any officer or other person to recover for such liquors, a seizure and destruction of liquor shipped from a point within the state to a prohibited district, is a defense to an action against the carrier for the conversion thereof.—ST. LOUIS S. W. RY. CO v. GANS, Ark., 62 S. W. Rep. 742.

42. JUDGMENT—Collateral Attack — Presumptions.—Where a judgment is attacked collaterally upon the ground that no findings of fact were made, signed and filed by the judge, the validity of such judgment is to be determined from the judgment roll; and if it appears therefrom that the court rendering it is a court of general jurisdiction, and had jurisdiction of the parties and subject-matter of the action, the law presumes that finding of fact were, in their absence, waived, unless the judgment roll affirmatively shows that such findings were not waived.—MCCORNICK v. FRIEDMAN, Idaho, 65 Pac. Rep. 440.

43. JURISDICTION—Justice Court — Suit to Recover Taxes.—The justice court, and not the district court, has jurisdiction of an action under Rev. St., art. 5212a, to recover taxes in the sum of $120.77 on unrendered personal property, and the statutory penalty of 10 per cent. thereon for failure to pay the same, since it is an action on a debt, and the amount due is within the jurisdiction of the justice court.—STATE v. TRILLING, Tex., 62 S. W. Rep. 788.

44. LANDLORD AND TENANT—Implied Lease.—Where a petition alleged that defendant agreed to rent certain land for a period of from year to year, at an agreed rental, and that he occupied said land for two years under the agreement, becoming liable thereby for the rental, an instruction on an express contract, and not on an implied lease, is required.—ELMENDORF v. SCHUH, Tex., 62 S. W. Rep. 797.

45. LANDLORD AND TENANT — Lease — Authority of Agent—Ratification.—Where a term lease made by an agent having no authority to make such lease is repudiated by the principal, who notifies the tenant there-

of, both orally and in writing, but authorizes the latter to remain as tenant from month to month, the acceptance of rent at the rate specified in the lease is not a ratification thereof.—OWENS v. SWANTON, Wash., 64 Pac. Rep. 920.

46. LANDLORD AND TENANT—Lease—Refusal—Damages—Measure.—Where a lease gave a tenant an option to renew it for three years, and after an exercise of the option the landlord rented the property to another, and refused to allow the tenant to remain in possession, it was proper to charge that the landlord was liable for the difference between the rental value of the land for the renewal term and the amount which the tenant had agree to pay for the lease.—WALCOTT v. MCNEW, Tex., 62 S. W. Rep. 815.

47. LANDLORD AND TENANT—Subletting—Landlord's Lien.—That a landlord consents to the subletting of part of the property, the subtenant agreeing to pay rent to the tenant, and makes no agreement to pay rent to the landlord, does not constitute a waiver of the landlord's lien on the subtenant's crop.—TROUT v. MCQUEEN, Tex., 62 S. W. Rep. 928.

48. LIMITATIONS—Prescription—Adverse Possession.—Where a defendant in a petitory action has been in possession, claiming as owner, of the property sued for, for more than 30 years, the action is barred by prescription, whether he can show title or not, unless the plaintiff is within some exception established by law. *A fortiori* is this the case where it appears that the plaintiff has always lived in the neighborhood, and is aware of such possession and claim.—LANDRY v. LANDRY, La., 29 South. Rep. 901.

49. LIMITATIONS—Trespass to Try Title.—Where, in an action of trespass to try title to 35 acres, defendant showed a deed to himself from one who wrongfully claimed title, the recording of such deed, and subsequent payment of taxes, and actual possession of 5 or 6 acres of the land by fencing and cultivation for more than the period of limitations, but did not identify such 5 or 6 acres so that the same could be awarded to him out of the larger tract, judgment for the plaintiffs for the whole tract should not be reversed.—WILCOXSON v. HOWARD, Tex., 62 S. W. Rep. 802.

50. LIMITATION OF ACTIONS—Acknowledgment in Writing—Sufficiency.—A debtor, in writing to his creditors, wrote of "my indebtedness to you," asked for a statement of what he "now" owed, "estimated" his indebtedness to one of them at more than it really was, and asked for statements from them of their figures, that he may compare with his own. There was nothing in his letters to "repel the presumption" of a promise to pay what he admitted he owed, and nothing inconsistent with such an inference from his admission. Held sufficient acknowledgment in writing, within Code CIV. PROC. N. Y. § 395, to take the debts in question out of the operation of the statute.—IN RE LORILLARD, U. S. C. C. of App., Second Circuit, 107 Fed. Rep. 677.

51. MASTER AND SERVANT — Assumption of Risk.—A complaint stated that plaintiff, a carpenter, was employed by defendants to repair a house roof, and that while standing in the gutter at the edge of the roof, and doing the work with one hand, holding on to a window casing with the other, the casing broke, causing plaintiff to fall to the ground. The complaint also alleged that the unsound condition of the casing was unknown to plaintiff, nor could it have become known to him by the exercise of ordinary care. Held, that the plaintiff assumed the risk, since the danger was as open to his observation as to his employer's, and that allegations in the complaint that his employers assured him of the safety of that manner of working, and commanded him to proceed in that way, and that plaintiff complied because it was necessary for plaintiff to work to support himself and family, were immaterial.—HENCKE v. ELLIS, Wis., 86 N. W. Rep. 171.

52. MUNICIPAL CORPORATIONS—Cleaning Streets—Liability of City.—The cleaning of city streets and disposal of such garbage is not the performance of a duty primarily resting on the state, but is the exercise of a corporate power, as distinguished from a governmental function, for the abuse of which a city is liable.—OSTROM v. CITY OF SAN ANTONIO, Tex., 62 S. W. Rep. 909.

53. MUNICIPAL CORPORATIONS — Levee District.—Neither the St. Francis levee district, nor the board of directors thereof, is a "municipality;" and hence its bonds issued in pursuance of legislative authority are not void, as being issued in violation of Const. art. 16, § 1, prohibiting a county, city, town, or municipality from issuing any interest-bearing evidences of debt, except to pay an existing indebtedness.—MEMPHIS TRUST CO. v. BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DIST., Ark., 62 S. W. Rep. 902.

54. NEGLIGENCE—Ordinary Care.—In an action by a locomotive fireman for personal injuries, an instruction requiring him to use "such ordinary care as a person of ordinary prudence would have used under similar circumstances" was not misleading, as causing the jury to believe that plaintiff was not required to use as high degree of care as a person of ordinary prudence "would reasonably have been expected to exercise" under similar circumstances.—GALVESTON, ETC. RY. CO. v. WILLIAMS, Tex., 62 S. W. Rep. 808.

55. NEGLIGENCE — Traveled Roadway — Fence — Injuries—Allegations.—Plaintiff alleged that, while traveling in a buggy at night, he ran into a barbed-wire fence which had been constructed across the road by defendant, and that thereby his horse was so injured that it afterwards died; that the road was in common use by the traveling public, and had been so used for a long time prior to the accident; and that the fence had no plank by which it could be distinguished at night. Held, that the petition was not demurrable for not alleging that the road was a public road and not on defendant's land, since, if defendant knew the road was in common use by the public, and the probability of injury, he was liable for constructing a wire fence across it in such a manner as to occasion injury to others, though the road was on his own land.—ALLISON v. HANEY, Tex., 62 S. W. Rep. 933.

56. OFFICERS—Inspection of Local Mines.—Act April 8, 1885, provides that in case of a vacancy in the office of coal-mine inspector, occasioned by death, resignation, or malfeasance in office, which shall be determined as in the case of other officers, the governor shall appoint some one to fill the office. Held that, the statute allowing a removal only for a specified cause, the governor could not remove the inspector of mines without hearing and notice to the inspector.—INSPECTOR OF COAL MINES v. DENMAN, Colo., 64 Pac. Rep. 455.

57. PRINCIPAL AND SURETY—Failure to Notify Surety of Principal's Breach of Duty—Conclusiveness of Judgment Against Principal.—The surety in the bond of an assignee for creditors cannot complain that he was not notified of the principal's failure to perform his duty, where the breach of duty consisted in failure to pay over the amount ascertained to be due in a settlement suit. The payment by an assignee for creditors of the amount found to be due upon a settlement is within the obligation of his bond, conditioned for the faithful discharge of his duties as assignee, and a judgment against an assignee for creditors in a suit to settle his accounts is conclusive against the surety as to the amount due, though he had no notice of the proceeding.—NATIONAL SURETY CO. v. ARTERBURN, Ky., 62 S. W. Rep. 862.

58. PUBLIC LANDS—School Lands—Actual Settlers.—An applicant to purchase school lands as an actual settler, who builds his house, through mistake, on an adjoining track of land, is an actual settler, and title derived from him is inferior to that of a subsequent purchaser from the state.—MARTIN v. MARR, Tex., 62 S. W. Rep. 932.